United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2077

To be argued by
MICHAEL YOUNG

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARRY STANLEY CROSSLEY,

Appellant.

-against-

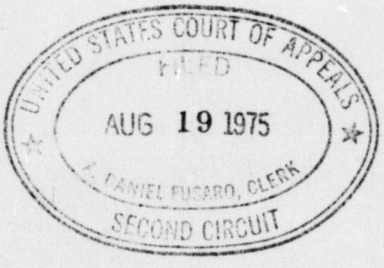
UNITED STATES OF AMERICA,

Appellee.

Docket No. 75-2077

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARRY STANLEY CROSSLEY, Appellant, -against- UNITED STATES OF AMERICA, Appellee.	Docket No. 75-2077

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court erred in denying appellant Crossley's application to be provided with the transcripts of his Federal court proceedings *in forma pauperis*.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Inzer B. Wyatt) entered on January 31, 1975, denying petitioner-appellant Crossley's pro se application pursuant to 28 U.S.C. §1915 for an order granting him leave to proceed in forma pauperis and directing the Government to provide him with the transcripts of his guilty plea proceedings under Indictments 71 Cr. 697 and 71 Cr. 441.

On July 15, 1975, this Court assigned the Federal Defender Services Unit of The Legal Aid Society as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Crossley was originally indicted in the Northern District of Illinois for one count of theft from an employee of a Federally insured bank with the use of a dangerous weapon on September 29, 1970, in violation of 18 U.S.C. §2113(a) and §2113(d) (N.D.Ill. 71 Cr. 3).*

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*A copy of this indictment is "B" to appellant's separate appendix.

Thereafter he was also indicted in the Southern District of New York on one count of theft from employees of a Federally insured bank with the use of a dangerous weapon on January 11, 1971, in violation of 18 U.S.C. §2113(a) and §2113(d) (S.D.N.Y. 71 Cr. 441).* On June 18, 1971, Crossley pleaded guilty to Indictment 71 Cr. 441.

Pursuant to Rule 20 of the Federal Rules of Criminal Procedure, the Illinois charge was transferred to the Southern District of New York, and was docketed as Indictment 71 Cr. 697** of this District. On June 18, 1971, Crossley pleaded guilty to Indictment 71 Cr. 697.

On August 23, 1971, he was sentenced to fifteen years' incarceration on each charge, the sentences to run concurrently.

On or about February 7, 1973, appellant Crossley filed a pro se motion for a "bill of particulars," requesting, among other things, a transcript of his guilty plea and sentencing proceedings pursuant to Indictments 71 Cr. 441 and 71 Cr. 697. Crossley included with this motion an "affidavit in forma pauperis" in which he stated that he was "unable to pay the fees of the filing of the foregoing Motion" and was

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*A copy of this indictment is "D" to appellant's separate appendix, and the docket entries for 71 Cr. 441 are "C".

**The docket entries for 71 Cr. 697 are set forth as "A" to appellant's separate appendix.

"indigent and has no property stocks, bonds, nor United States currency."*

In an order dated February 9, 1973, Judge Wyatt denied appellant Crossley's motion on the ground that since Mr. Crossley had already pleaded guilty to both indictments, a motion for a "bill of particulars" was "frivolous."**

On or about January 28, 1975, appellant Crossley filed a notice of motion and affidavit to "obtain documents in forma pauperis," pursuant to 28 U.S.C. §1915.*** The motion requested an order enabling Mr. Crossley to obtain the transcripts of his arraignment and sentencing proceedings pursuant to 71 Cr. 697 and 71 Cr. 441. In his supporting affidavit Mr. Crossley stated that the Government had acted in violation of his Fifth Amendment rights in both cases and that he needed the transcripts in order properly to present his claims in an application pursuant to 28 U.S.C. §2255. He further stated that he had no funds with which to pay for the transcripts, and that he had no "stock, real estate, or property that he can submit to this court for security in order to obtain" the transcripts.

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*Copies of this motion and affidavit are set forth as "E" to appellant's separate appendix.

**A copy of Judge Wyatt's opinion is set forth as "F" to appellant's separate appendix.

***Copies of this motion and affidavit are set forth as "G" to appellant's separate appendix.

On January 31, 1975, Judge Wyatt denied this motion "for want of any sufficient showing."*

On or about February 14, 1975, appellant Crossley filed a "notice of appeal" from Judge Wyatt's decision of January 31, 1975, requesting leave to appeal "as an indigent."**

In an order dated February 25, 1975, Judge Wyatt denied this application.*** In so doing, the Judge stated that he was treating the "notice of appeal" as a "motion for leave to proceed on appeal in forma pauperis," pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure. The Judge noted that although appellant Crossley had failed to attach to his "notice of appeal" an affidavit attesting to his inability to pay, such an affidavit had been attached to the "motion to obtain documents in forma pauperis" which was the subject of the appeal application. The Judge acknowledged that appellant Crossley was seeking the transcripts of these proceedings in order to use them to prepare an application pursuant to 28 U.S.C. §2255. Concerning the earlier denial of the application for transcripts in forma pau-

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*Judge Wyatt's denial was endorsed on the motion, and is set forth as "H" to appellant's separate appendix.

**A copy of this notice is set forth as "I" to appellant's separate appendix.

***A copy of Judge Wyatt's decision denying leave to appeal in forma pauperis is set forth as "J" to appellant's separate appendix.

peris, the Judge stated:

> Petitioner has not yet made a motion under 28 U.S.C. §2255, has made no factual averments to suggest that he might be entitled to relief under that section, and therefore presented no ground for granting his request for transcripts.

The Judge then denied the motion to proceed on appeal in forma pauperis on the ground that since the Judge believed Mr. Crossley's appeal would be frivolous, Crossley's application to appeal was "not taken in good faith."

Appellant Crossley then filed a "motion for leave to proceed on appeal in forma pauperis" with this Court on or about March 5, 1975.* Concerning his indigency, Crossley stated that he was "without sufficient funds to pay for such appeal" (Id. at 1), that he "has no property, real estate, bank account, nor resources of any kind" with which to pay the costs "or give security therefor" (Id. at 2), and that he had "no other means available" to obtain the transcripts sought in his §1915 district court application (Id. at 8). Concerning his need for the transcripts, appellant Crossley stated that the statements of his appointed lawyer and the Government in these proceedings would establish that his guilty pleas had been involuntary and that the transcripts of the proceedings would also show that the District Court had improperly delayed his sentencing in order to compel

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*A copy of this application is "K" to appellant's separate appendix.

him to testify before a grand jury (Id. at 9).

On May 14, 1975, this Court granted appellant Crossley leave to proceed in forma pauperis.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANT CROSSLEY'S APPLICATION TO BE PROVIDED WITH THE TRANSCRIPTS OF HIS FEDERAL COURT PROCEEDINGS IN FORMA PAUPERIS.

In 1971 appellant Crossley pleaded guilty to two indictments, 71 Cr. 697 and 71 Cr. 441. This appeal is from the denial of a pro se motion made by appellant Crossley pursuant to 28 U.S.C. §1915 to obtain in forma pauperis the transcripts of his Federal court proceedings in those two cases so that he could use them to prepare an application pursuant to 28 U.S.C. §2255.

In the affidavit annexed to his §1915 application, appellant Crossley stated that the Government had violated his Fifth Amendment rights in the two guilty plea proceedings and that he needed the transcripts of those proceedings in order to document this claim of constitutional violation in an application pursuant to 28 U.S.C. §2255. He also stated that he was indigent and unable to pay for the transcripts himself. The The District Court did not dispute Crossley's claim of indigency,* but rather denied his §1915 application on the

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*Crossley's indigency is not an issue in this appeal, having apparently been established to the satisfaction of both the District Court and this Court. In the in forma pauperis affidavit attached to his §1915 application, Mr. Crossley stated that he had no funds with which to pay for the requested transcripts, and that he had no "stock, real estate, or property that he can submit to this court for

ground that he had failed to file a §2255 application or otherwise make factual averments to show that he might be entitled to relief under §2255 and that, absent such a showing, he was not entitled to the requested transcripts.

In his pro se application to this Court for leave to appeal the denial of his §1915 application in forma pauperis, appellant Crossley provided further detail as to the issues he wished to raise in a §2255 application, stating that he needed the transcripts to show, through the statements of his appointed counsel and the Government during the proceedings that his guilty pleas had been involuntary and that the District Court had improperly delayed his sentencing proceeding in order to force him to appear before a grand jury.

(Footnote continued from the preceding page)

security in order to obtain" the transcripts. The District Court, in denying the §1915 application, stated only that there was a "want of sufficient showing." In the denial of appellant Crossley's application for leave to appeal in forma pauperis, however, the District Court clarified its ruling on the §1915 application. After noting that appellant Crossley had included with his §1915 application an affidavit "stating his inability to pay for the documents requested in that motion," the Judge indicated that his denial of the §1915 application had been based on Crossley's failure to make a sufficient showing of error which would entitle him to §2255 relief rather than a failure to establish his indigency.

Moreover, this Court granted Crossley leave to appeal in forma pauperis, indicating that he had established his indigency to the satisfaction of this Court.

The question of whether an indigent Federal prisoner may be required to make a prior "particularized showing of need" in order to obtain transcripts of his Federal criminal proceedings for use in preparing a §2255 application has never been decided by the Supreme Court, and is apparently an issue of first impression for this Court. Although early decisions by other Circuits have required a prior showing of need, recent Supreme Court decisions have suggested, and the most recent Circuit court decision has held, that this requirement violates constitutional due process and equal protection principles.

Appellant Crossley submits that his papers in this proceeding are sufficient to entitle him to the requested transcripts under the "particularized showing of need" standard. Alternatively, he is constitutionally entitled to those transcripts absent such a prior showing.

A. Appellant Crossley's papers in this proceeding present a sufficient showing of need to entitle him to the transcripts of his Federal court proceedings.

In his §1915 application to the District Court, appellant Crossley stated that the Government had violated his "Fifth Amendment" rights in the plea proceedings in his case and that he needed the transcripts of those proceedings in order to raise this claim in an application pursuant to §2255. This statement indicates that Crossley was not seeking the transcripts of his criminal proceedings merely to "comb the record in hope of discovering some flaw" (see, e.g., MacCollum v. United States, 511 F.2d 1116, 1124 (9th Cir. 1974) (dissenting opinion)), but rather that he had already focused on a constitutional claim and needed the transcripts in order to make specific factual averments as to that claim. This claim of Fifth Amendment violation should be found to constitute a sufficient showing of need to entitle him to the requested transcripts.

Additional detail as to the claims appellant Crossley intends to raise in his §2255 application was provided in his application to this Court for leave to appeal in forma pauperis (Appendix K). There he alleges that the transcripts will show through the statements of his appointed lawyer and the Government that his guilty pleas were involuntary and

that the District Court improperly delayed his sentencing proceeding in order to force him to appear before a grand jury. Apparently this pro se applicant was unable to quote the statements on which he intended to rely or be more specific in his factual allegations as to events which had occurred four years previously without the benefit of the transcripts he was seeking. Although these further averments were not before the District Judge when he denied appellant's §1915 application, Crossley's pro se status at that stage of the proceedings requires that the papers he has submitted be given lenient consideration by this Court. Cf. Darr v. Burfors, 339 U.S. 200, 203-204 (1950); Price v. Johnson, 334 U.S. 226, 292 (1948); Rice v. Olson, 324 U.S. 786, 791-792 (1945); Tomkins v. Missouri, 323 U.S. 485, 487 (1945); Holiday v. Johnson, 313 U.S. 342, 350 (1941). This is particularly true in light of appellant Crossley's statement in his application to this Court for leave to appeal in forma pauperis that he had not been aware that it was necessary to make such averments in his §1915 application (Appendix K at 9). Thus if, as appellant Crossley maintains, the allegations in his application to this Court, together with his District Court papers, make a sufficient showing of need for the transcripts, the interests of justice would best be served by remanding this case to the District Court with instructions that those transcripts be provided.

B. Appellant Crossley is entitled to the transcripts of his Federal court proceedings without making a prior particularized showing of need.

Even if appellant Crossley has failed to establish his right to the requested transcripts under the "particularized showing of need" standard, he is entitled to those transcripts without making such a prior showing.*

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*The precise question raised in this section of the appeal -- whether an indigent Federal prisoner is entitled to a transcript of his Federal criminal proceedings for use in preparing a §2255 application without a prior showing of claims which would entitle him to relief under that section -- has not been decided by the Supreme Court or this Circuit (see MacCollum v. United States, supra, 411 F.2d at 1118). In Wade v. Wilson, 396 U.S. 282, 286 (1970), the issue of whether an indigent State prisoner preparing a habeas corpus application was entitled to the transcripts of his State court proceedings absent a prior showing of claims which would entitle him to relief was raised but not reached. A similar issue involving the right of an indigent State prisoner to a transcript of his State court proceedings is currently before this Court in United States ex rel. Buford v. Henderson, Docket No. 75-2052.

Although some of the early Circuit decisions have required a prior showing of particularized need in such circumstances (see, e.g., Cowan v. United States, 445 F.2d 855 (5th Cir. 1971); Bentley v. United States, 431 F.2d 250 (6th Cir. 1970), cert. denied, 401 U.S. 920 (1971); Benthiem v. United States, 403 F.2d 1009 (1st Cir. 1968), cert. denied, 396 U.S. 945 (1969); United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964); Cubert v. United States, 325 F.2d 920 (8th Cir. 1964)), appellant Crossley submits that those decisions are in conflict with recent Supreme Court decisions on related issues which appear to encompass an indigent Federal prisoner's right to transcripts without such a prior showing. See, e.g., Hardy v. United States, 375 U.S. 277 (1964); Gardner v. California, 393 U.S. 367 (1969); Britt

The right of an indigent to obtain a transcript of his criminal proceedings at Government expense has been the subject of extensive Supreme Court litigation in recent years. That constitutional equal protection and due process rights entitle an indigent to a transcript or adequate substitute for use in his direct appeal is firmly established:

(Footnote continued from the preceding page)

v. North Carolina, 404 U.S. 226 (1971). This conclusion is confirmed by MacCollum v. United States, supra, the latest Circuit court decision on this precise issue and the only decision to consider the effect of the Supreme Court's most recent decisions (Britt v. North Carolina, supra; Ross v. Moffitt, 417 U.S. 600 (1974)) on the question. In MacCollum, the Ninth Circuit concluded that these and other Supreme Court decisions compelled recognition of an indigent Federal prisoner's constitutional right to the transcript of his Federal proceedings for use in preparing a §2255 application without a prior showing of errors which would entitle him to §2255 relief.

In addition to the Ninth Circuit's decision in MacCollum, the Sixth Circuit, in Bentley v. United States, supra, suggested that constitutional due process and equal protection principles might mandate recognition of such a right:

> This, of course, still leaves to be decided whether the federal constitution gives appellant the unqualified right (one which an affluent cell mate could exercise by purchase) to a transcript at government expense for new counsel to search for constitutional error in order to file a motion for postconviction relief.
>
> We find it impossible to deny that at least theoretically an affirmative answer would serve the constitutional purpose of the equal protection and due process clauses as they have been spelled out above.
>
> We believe the Supreme Court has held each of these two concepts independently to require that "all people charged with crime must, so far as the

> ... [D]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.
>
> Griffin v. Illinois, 315 U.S. 12, 19 (1956).

See also Eskridge v. Washington State Board of Prison Terms & Paroles, 357 U.S. 213 (1958); Draper v. Washington, 372 U.S. 487 (1963); Hardy v. United States, supra, 375 U.S. 277; Williams v. Oklahoma City, 404 U.S. 189 (1971). This is so even if the trial court concludes that there are no issues which would title an indigent defendant to relief on appeal. Eskridge v. Washington State Board of Prison Terms & Paroles, supra; Draper v. Washington, supra. The Supreme Court has also recognized an indigent's right to transcripts of habeas corpus proceedings (Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, supra, 393 U.S. 367), preliminary hearings (Roberts v. LaVallee, 389 U.S. 40 (1967)),

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> law is concerned, 'stand on an equality before the bar of justice in every American court.' Chambers v. Florida, 309 U.S. 227, 241, 60 S.Ct. 472, 84 L.Ed. 716. See also Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220." Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 589 (1956).
>
> Id., 431 F.2d at 254.

The Sixth Circuit elected, however, to retain its "prior showing of need" requirement until the Supreme Court renders a decision on this issue. It should be noted that Bentley was decided before the Supreme Court's decision in Britt v. North Carolina, supra, in which the Court expressed serious doubt as to the constitutional validity of such a requirement in a related context.

and even previous mistrials (Britt v. North Carolina, supra, 404 U.S. 226).

Certain of the earlier of these Supreme Court cases appeared to condition this right to a free transcript upon a prior particularized showing of need for it. See, e.g., Draper v. Washington, supra, 372 U.S. at 496; Lane v. Brown, 372 U.S. 477, 480 (1963); Eskridge v. Washington State Board of Prison Terms & Paroles, supra, 357 U.S. at 215-216; Griffin v. Illinois, supra, 351 U.S. at 16.*

The more recent Supreme Court decisions have indicated, however, that to impose on an indigent the obligation of making a prior showing of need in order to obtain the transcripts at Government expense is violative of his constitutional rights. Applying the principles recognized in earlier decisions as to the importance of a criminal defendant's being able to scan the record of his proceedings for errors, some of which may have previously gone unnoticed:

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*It was these decisions which apparently led Congress, in adopting 28 U.S.C. §753, to provide that the Government was required to pay for transcripts of Federal criminal proceedings in §2255 proceedings

> ... if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law * * * . Anything short of a complete transcript is incompatible with effective appellate advocacy.
>
> Hardy v. United States, supra, 375 U.S. at 228 (concurring opinion),

and the inequity of restricting an indigent's access to such records:

> Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, e.g., Draper v. Washington, [supra]; Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Only last Term, in Long v. District Court of Iowa, [supra], we reiterated the statement first made in Smith v. Bennett, 365 U.S. 708, 709, 81 S.Ct. 895, 896, 6 L.Ed. 2d 39 (1961), that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."
>
> Roberts v. LaVallee, supra, 389 U.S. at 42;

(see also United States ex rel. Wilson v. McCann, 408 F.2d 896, 897 (2d Cir. 1969)), the Supreme Court, in its most recent cases, has not required an indigent to make a prior showing of need in order

to obtain the transcripts of a habeas corpus hearing (Long v. District Court of Iowa, supra), a preliminary hearing (Roberts v. LaVallee, supra), a previous habeas corpus hearing for use in a second habeas corpus petition (Gardner v. California, supra), or even a previous mistrial (Britt v. North Carolina, supra). In Britt, the Court expressed doubt as to the constitutional validity of requiring an indigent seeking transcripts to make a prior showing of need:

> We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of a particular case....
>
> Id., 404 U.S. at 228.

In MacCollom v. United States, supra, the Ninth Circuit concluded that these recent Supreme Court decisions mandated recognition of an indigent Federal prisoner's right to obtain a transcript of his Federal criminal proceedings for use in preparing a §2255 application without a prior showing of errors which would entitle him to §2255 relief. In so holding the Ninth Circuit relied on both Constitutional considerations -- that equal protection and due process were violated by requiring such a showing of an indigent seeking transcripts but not of his wealthier counterpart -- and practical considerations -- that an indigent may be unable to remember or

sufficiently reconstruct substantive errors in his criminal proceedings until he has had an opportunity to examine the transcript he seeks to obtain:

> A rule which demands that an indigent establish his need for a trial transcript, which he has never seen, before the government will produce it for his assistance in preparing a post-conviction motion under 28 U.S.C. §2255 may completely deny the indigent the opportunity to present a valid claim which he was not fortunate enough to remember. This rule seems to us to be a short-sighted approach that elevates economy over equality.
>
> Id., 511 F.2d at 1123.*

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*In response to the Government's argument that providing transcripts in such circumstances would entail considerable expense for the Government, the Ninth Circuit noted that such costs should not be over-estimated (id., 511 F.2d at 1123). Transcripts of most Federal criminal proceedings are already being provided to indigents for purposes of direct appeal. In the remaining cases, the cost of litigating the "particularized showing of need" question frequently exceeds the cost of the transcript itself (id., 511 F.2d at 1123). This is clearly the case in the present proceeding, where the transcripts of appellant Crossley's plea and sentencing proceedings do not, in all likelihood, exceed thirty pages. Moreover, the Ninth Circuit found that if such transcripts were provided to indigent Federal prisoners for use in determining a §2255 application, they would frequently reveal to the prisoner that there was no ground for such an application, thereby sparing the court the considerable time now consumed on frivolous §2255 applications (id., 511 F.2d at 1123). Finally, even if, despite these countervailing considerations, the provision of transcripts in such circumstances did constitute an increased expense for the Government, such an expense cannot provide the basis for the denial of a constitutional right (id., 511 F.2d at 1124).

In finding indigents constitutionally entitled to transcripts without a prior showing of need in such circumstances, the Ninth Circuit concluded that it was not required to declare 28 U.S.C. §753(f) unconstitutional. That section provides that the Government shall pay for transcripts in §2255 proceedings if a court certifies that the proceeding is not frivolous and that the transcript is needed to decide the issue raised. The Ninth Circuit found that this provision

> ... merely authorizes under certain circumstances the payment of fees for transcripts furnished in §2255 proceedings. The section does not prohibit courts from also requiring the government to supply an imprisoned indigent with a free transcript before he files a §2255 motion. Such a court order would simply fill a constitutional deficit not addressed by the statute.
>
> Id., 511 F.2d at 1120.*

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*In so interpreting §573(f), the Ninth Circuit followed the well established principle that whenever possible a statute should be interpreted in such a manner as to preserve its constitutionality. Parker v. Levy, 417 U.S. 733, 757 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1975); Graham v. Richardson, 403 U.S. 365, 382-383 (1971); see, e.g., United States v. Vuitch, 402 U.S. 62, 70 (1971). If, however, this Court should reject the Ninth Circuit's interpretation of §753(f) and find instead that this provision prohibits the Federal courts from providing indigent Federal prisoners with transcripts of their criminal proceedings at Government expense for use in preparing a §2255 application in the absence of a prior particularized showing of need, this Court must then proceed to consider the constitutionality of §753(f). Appellant Crossley submits that §753(f), if so interpreted, is violative of due process and equal protection guarantees for the reasons set forth in this brief. Alternatively, the provision, so interpreted is violative of equal protection guarantees because it would impose a "prior showing" requirement on indigent §2255 applicants which is not imposed on indigent §2254 applicants. Compare the first and second sentences of §573(f); see also MacCollom v. United States, supra, 511 F.2d at 1116. Such a distinction, lacking any rational basis, is constitution-

The Ninth Circuit also found that the recognition of an indigent Federal prisoner's right to transcripts without a prior showing of need was consistent with the Supreme Court's decision in Ross v. Moffitt, 417 U.S. 600 (1974). In that case the Court, although finding that an indigent State prisoner was not constitutionally entitled to counsel in discretionary appeals or applications for certiorari, also held that due process and equal protection rights require that

> ... indigents have an adequate opportunity to present their claims fairly within the adversarial system.
>
> Id., 417 U.S. at 612.

The Ninth Circuit found that to impose on indigents the requirement that they make a prior showing of need in order to obtain transcripts of their criminal proceedings improperly infringed on this constitutional right.

Appellant Crossley submits that the District Court violated his equal protection and due process rights in denying his request for transcripts of his Federal criminal proceedings because he had failed to identify in advance the errors in those proceedings which would entitle him to §2255 relief. Consequently, this case should be remanded to the District Court with directions that appellant Crossley be provided

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ally impermissible. See, e.g., Graham v. Richardson, supra, 403 U.S. at 370-376; Britt v. North Carolina, supra; Roberts v. LaVallee, supra; Long v. District Court of Iowa, supra.

with the requested transcripts.

CONCLUSION

For the foregoing reasons this Court should remand this case to the District Court with instructions to provide the requested transcripts.

Respectfully submitted,

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Certificate of Service

Aug 19, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.